Trends in international investment rulemaking and investor-State dispute settlement

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Legal framework for investment: Hierarchy of norms

✓ National laws and regulations, investment codes
✓ State contracts, investment agreements
✓ Bilateral investment treaties (BITs) for the promotion and protection of investment
✓ Double taxation treaties (DTTs)
✓ Preferential trade and investment agreements
✓ Regional (OECD, APEC) and sectoral agreements (Energy Charter)
✓ Multilateral disciplines and specific agreements (WTO GATS, TRIMs, TRIPs; ICSID, NY Convention, MIGA)
Objectives of the legal investment framework

Restrictions
- Entry and establishment
- Ownership and control
- Operational restrictions
- Authorization and reporting
  Etc..

Standards of treatment & protection
- Transparency
- Treatment (NT, MFN, FET)
- Expropriation & compensation

These objectives can be achieved through:
- National policies
- Investment contracts/State contracts
- International investment agreements (IIAs)
The international investment legal framework: role and objectives

International investment agreements (IIAs):

- Guarantees of protection for foreign investors
- Contribute to the creation of a stable, predictable and transparent regulatory framework for international investment - strengthen the enabling framework for FDI
- Reinforce economic cooperation and facilitate coordination of investment relations (between host States, home States, international investors and other development stakeholders) through agreed common denominators
- Complement national laws on investment (interface between national and international investment policies)
A great number of IIAs cover more or less the same issues

• Preamble
• Definitions (investment/investor)
• Admission and establishment
• Core standards of protection:
  – Fair and equitable treatment
  – Non-discrimination (NT/MFN)
  – Expropriation
  – Transfer of funds
  – Dispute settlement (State-State and investor-State)

…but the **concrete way in which they are addressed differs substantially**
Trends in international investment agreements and investor-State dispute settlement
Recent trends in IIAs - highlights

- Rapid proliferation at all levels

- International investment rules are increasingly being formulated as part of agreements that encompass a broader range of issues (FTAs)

- Investment provisions in new agreements tend to be increasingly sophisticated and complex in content

- South-South cooperation on international investment policy is intensifying

- Increasing activity in international investment treaty-making has been paralleled by a rise in investor-State disputes.
The network of BITs continues to grow rapidly, there are over 2700 BITs

Source: UNCTAD
Top ten signatories of BITs in the world

Germany
China
Switzerland
United Kingdom
Egypt
Italy
France
Netherlands
Belgium and Luxembourg
Korea, Republic of
Top 10 MENA BITs signatories

Source: UNCTAD data, June 2009

582 BITs signed by the MENA region (21% of all BITs concluded)
Over 270 economic agreements with investment provisions

Source: UNCTAD
Examples of integration agreements with investment provisions in the MENA region

- FTA Canada - Jordan (signed 2009, not in force)
- FTA Turkey – Morocco (signed in 2004)
- FTA Turkey – Tunisia (signed in 2005)
- Agadir Agreement: the Arab Mediterranean FTA (Jordan, Tunisia, Egypt, Morocco) (2007) – *provisions on services*
- Greater Arab Free Trade Area (GAFTA) (1998) – 18 members of the Arab League
- Investment Agreement for the COMESA Common Investment Area, 2007 - *substantive investment provisions*
New generation of IIAs: Increasingly sophisticated and complex

- United States and Canadian model BITs (2004) and investment chapters in FTAs
- Tend to be increasingly sophisticated in content
- Clarifying in greater detail the meaning of a number of standard clauses (FET, expropriation, exceptions, ISDS)
- Putting more emphasis on the protection of national security, health, safety, the environment, and labour rights
The increase in IIAs has been paralleled by an increase in investor-State disputes

→ The cumulative number of known treaty-based cases reached 357 known claims by end 2009.

→ 57% were initiated during the last 5 years.

→ While the awards have helped to clarify the meaning and content of individual treaty provisions, some contradictory decisions have also created uncertainty.
Known investment treaty arbitrations

Figure 1. Known investment treaty arbitrations (cumulative and newly instituted cases), 1989–2009

Source: UNCTAD.
Disputes by forum of arbitration

- 225 cases filed under ICSID (or the ICSID Additional Facility)
- 91 under the United Nations Commission on International Trade Law (UNCITRAL)
- 19 with the Stockholm Chamber of Commerce
- 8 administered by the Permanent Court of Arbitration (PCA)
- 5 with the International Chamber of Commerce
- 4 ad-hoc arbitration
- One case filed with CRCICA
- 4 cases with unknown applicable rules
Countries involved

• 81 countries faced investment treaty arbitrations
  → 49 developing countries
  → 17 developed countries
  → 15 economies in transition

• Most claims are initiated by investors by developed countries
  → only 23 cases filed by investors from developing countries
Known investment treaty claims, by defendants

Number of cases

- Argentine Republic
- Mexico
- Czech Republic
- Ecuador
- United States
- Canada
- Ukraine
- Venezuela
- Poland
- Egypt
Conclusions

• End 2009, 164 cases had been brought to a conclusion

→ 38% in favor of the State
→ 29% in favor of the investor
→ 34% were settled
ISDS mechanism: concerns

- Increasing use of ISDS mechanism by foreign investors
- High costs involved in conducting procedures
- Arbitration awards can involve huge sums
- Technical complexity of ISDS. Concerns on the technical capability of countries to handle investment disputes that they face
Implications

→ **Challenges**: complexity, overlaps, inconsistency

→ The negotiation of IIAs includes **interrelated and complicated policy issues** that touch upon a whole range of **domestic concerns**

→ This may render economic policies of host countries more complicated and lead to lack of **policy coherence** (challenge to formulate coherent investment policy)
Challenges

- Countries often lack the necessary human resources to negotiate agreements that appropriately reflect their interests and needs
- Risk of overlapping and sometimes conflicting commitments in IIAs
- Implementing IIA obligations (ratification, conformity with national laws)
- Developing alternative dispute resolution (ADR) methods and dispute prevention policies
- Dispute management techniques
- Strengthening the development dimension of IIAs